

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BETTY WASKO,

Plaintiff,

v.

CHICAGO TITLE INSURANCE  
COMPANY, a foreign  
corporation,

Defendant.

NO. CV-04-0364-EFS

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT ON  
ALL CLAIMS**

BEFORE THE COURT, without oral argument, is Defendant Chicago Title Insurance Co.'s ("Chicago Title's") Motion for Summary Judgment on All Claims (Ct. Rec. 14). After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants Chicago Title's motion and dismisses Plaintiff's case for the reasons described below.

**I. Background**

In 1989, Plaintiff was hired as an accountant by an Ephrata company later acquired by Chicago Title.<sup>1</sup> In March 2003, Plaintiff was informed

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<sup>1</sup> Chicago Title was subsequently acquired by Fidelity National Financial, Inc. ("Fidelity"). However, for the purposes of this Order, all conduct of and decisions made by Fidelity after the acquisition of

1 by her supervisor, Ms. Anita Gruchalla, that Chicago Title planned to  
2 relocate its Ephrata office's accounting functions to Chicago Title's  
3 Seattle office. In late-August 2003, after Plaintiff had assisted in the  
4 process of relocating the Ephrata office's accounting functions to the  
5 Seattle office, she took a two-week vacation. When Plaintiff returned  
6 to work after her vacation, she was informed her position had been  
7 eliminated as a result of the consolidation she had assisted with and  
8 that she had been laid off. In total, Chicago Title laid off eight  
9 Ephrata office employees between September 2003 and January 2004. This  
10 group of employees include several under the age of forty.

## 11 **II. Age Discrimination Claim**

12 In Washington, to prevail in an age discrimination action, a  
13 plaintiff must establish a *prima facie* case of discrimination by  
14 producing "evidence to support findings that he (1) was between 40 and  
15 70 years old, (2) was discharged, (3) was doing satisfactory work, and  
16 (4) was replaced by a younger person." *Hume v. Am. Disposal Co.*, 124  
17 Wash. 2d 656, 686 (1994) (citing *Grimwood v. Univ. of Puget Sound, Inc.*,  
18 110 Wash. 2d 355, 362 (1988)). The production of such evidence gives  
19 rise to a rebuttable presumption of age discrimination. *Id.* If a *prima*  
20 *facie* case is established, the defendant is afforded an opportunity to  
21 rebut the presumption of discrimination "with evidence that the discharge  
22 was for nondiscriminatory reasons." *Id.* (citing *Carle v. McCord Credit*  
23 *Union*, 65 Wash. App. 93, 100 (1992)). If the defendant is able to

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25 Chicago Title will be referred to as conduct of and decisions made by  
26 Chicago Title.

1 produce evidence of a nondiscriminatory reason for the termination, the  
2 plaintiff is then required to "produce sufficient evidence that  
3 defendant's alleged nondiscriminatory reason for discharge was a  
4 pretext." *Id.* (citing *Grimwood*, 110 Wash. 2d at 364).

5 Chicago Title argues it is entitled to summary judgment on  
6 Plaintiff's claim of age discrimination because Plaintiff is unable to  
7 present evidence (1) she was replaced by a younger person or (2) that  
8 Chicago Title's nondiscriminatory reason for discharge was pretextual.

9 **A. Plaintiff's Prima Facie Case of Discrimination**

10 To meet her burden of establishing the fourth prong of a *prima facie*  
11 case of age discrimination, a plaintiff generally must produce evidence  
12 she was replaced by a younger person. *Grimwood*, 110 Wash. 2d at 362.  
13 However, Washington courts have indicated that this and all other *prima*  
14 *facie* elements are not intended "to be either 'rigid, mechanized, or  
15 ritualistic,' or the exclusive method of proving a claim." *Hatfield v.*  
16 *Columbia Fed. Sav. Bank*, 57 Wash. App. 876, 882 (1990) (citing *Grimwood*,  
17 110 Wash. 2d at 363). Instead, the "ultimate issue is whether age was  
18 a factor in a decision of an employer to terminate [a] . . . claimant and  
19 whether the age of claimant made a difference in determining whether  
20 [she] was to be retained or discharged." *Id.* (quoting *Ackerman v. Diamond*  
21 *Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982)).

22 Here, Chicago Title argues it is entitled to summary judgment on  
23 Plaintiff's age discrimination claim because Plaintiff failed to produce  
24 evidence she was replaced by a younger person and consequently establish  
25 the fourth element of a necessary *prima facie* case of age discrimination.  
26 Although Chicago Title correctly recognizes Plaintiff's failure to

1 produce evidence she was replaced by a younger person, the Court  
2 nonetheless denies Defendant's request for summary judgment on this issue  
3 because doing so would inappropriately treat the fourth *prima facie*  
4 element as the exclusive method of proving an age discrimination claim.

5 As noted in *Hatfield*, there are other ways an employer can  
6 discriminate against an employee based on age that do not necessarily  
7 involve the employee's replacement by a younger person. Thus, Plaintiff  
8 need not produce evidence she was replaced by a younger person to  
9 establish a *prima facie* case of age discrimination, so long as she  
10 produces some form of evidence that age was a factor in Chicago Title's  
11 decision to terminate her employment. Here, the Court finds sufficient  
12 evidence has been presented to establish the fourth *prima facie* element.  
13 Specifically, Plaintiff has produced evidence that (1) Chicago Title  
14 management expressed interest in "upgrading the appearance of the  
15 office[;]" (2) all employees over forty years of age, with the exception  
16 of one, were laid off or forced to leave; and (3) four employees under  
17 the age of forty were initially laid off, but rehired soon thereafter.  
18 (Ct. Rec. 28.) These facts, if found by the finder-of-fact, could  
19 reasonably lead to the conclusion Chicago Title discharged Plaintiff, at  
20 least in part, due to her age. Thus, Chicago Title's request for summary  
21 judgment on this issue is denied.

22 **B. Existence of a Nondiscriminatory Reason for Plaintiff's Discharge**

23 Once a plaintiff has produced sufficient evidence to establish a  
24 *prima facie* case and the consequential presumption of age discrimination,  
25 the defendant is afforded the opportunity to rebut the presumption of  
26 discrimination "with evidence that the discharge was for

1 nondiscriminatory reasons." *Grimwood*, 110 Wash. 2d at 362. One way to  
2 rebut the presumption of age discrimination is to produce evidence the  
3 plaintiff's position was eliminated. *Kohn v. Georgia-Pacific Corp.*, 69  
4 Wash. App. 709, 726 (1993) ('Elimination of a position is, on its face,  
5 a non-discriminatory reason for discharge.") In this case, because  
6 Chicago Title has produced evidence Plaintiff was discharged because her  
7 position was eliminated, the presumption of age discrimination has been  
8 rebutted.

9 **C. No Evidence of Pretext**

10 After a defendant produces evidence a particular discharge was for  
11 nondiscriminatory reasons, the presumption of discrimination "drops out  
12 of the picture[,]'" *Hill v. BCTI Income Fund-I*, 144 Wash. 2d 172, 182  
13 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993)), and  
14 the plaintiff is required to produce sufficient evidence that the  
15 defendant's alleged nondiscriminatory reason for discharge was merely  
16 pretext for a discriminatory purpose. *Grimwood*, 110 Wash. 2d at 364.  
17 Only if the plaintiff has produced such evidence should the case be  
18 submitted to the finder-of-fact. *Hume*, 124 Wash. 2d at 667-68.

19 "In age discrimination cases, a plaintiff may demonstrate pretext  
20 or discriminatory intent by showing disparate treatment. . . ." *Hume*, 124  
21 Wash. 2d at 668. When such a theory is advanced, the plaintiff must  
22 produce evidence she was treated differently than younger employees. *Id.*  
23 at 669. However, a "plaintiff may cannot create a pretext issue without  
24 some evidence that the articulated reason for the employment decision is  
25 unworthy of belief." *Kuyper v. Wash.*, 79 Wash. App. 732, 738 (1995). "To  
26 do this, a plaintiff must show, for example, that the reason has no basis

1 in fact, it was not really a motivating factor for the decision, it lacks  
2 a temporal connection to the decision or was not a motivating factor in  
3 employment decisions for other employees in the same circumstances." *Id.*  
4 at 738-39.

5 Here, nothing in Plaintiff's declaration evidences that Chicago  
6 Title's explanation for Plaintiff's discharge was unworthy of belief.  
7 Although Plaintiff asserts her supervisor had expressed an interest in  
8 "upgrading the appearance of the office" and that younger employees were  
9 rehired after an initial lay-off, no evidence has been presented to  
10 discredit Chicago Title's explanation for why Plaintiff was discharged  
11 and not rehired. For example, Plaintiff has presented no evidence that  
12 (1) the elimination of Plaintiff's position was not a sound business  
13 decision, (2) Chicago Title was not financially motivated to relocate  
14 Plaintiff's job functions to a different office, or (3) Plaintiff's  
15 discharge was not temporally connected to the elimination of her  
16 position. Thus, because Plaintiff has produced no evidence to support  
17 a finding that Chicago Title's reason for discharge was pretext for a  
18 discriminatory purpose, summary judgment is granted to Chicago Title on  
19 Plaintiff's age discrimination claim.

### 20 **III. Wrongful Discharge Claim**

21 Chicago Title moves the Court for summary judgment on Plaintiff's  
22 claim of wrongful discharge in violation of public policy. Chicago Title  
23 argues Plaintiff's tort claim for wrongful discharge is subsumed by her  
24 statutory claim of age discrimination under R.C.W. § 49.44.090. The  
25 Court concurs with Chicago Title's assertion. Because Washington's age  
26 discrimination statute prohibits the same kind of conduct alleged in a

1 wrongful discharge tort claim, the tort is already covered by the  
2 statutory claim. *Bennett v. Hardy*, 113 Wash. 2d 912, 923 (1990)  
3 (declining to address wrongful discharge claims based on age because the  
4 implied cause of action under R.C.W. § 49.44.090 encompasses these  
5 claims). Thus, Chicago Title is granted summary judgment on Plaintiff's  
6 wrongful discharge claim.

#### 7 **IV. Breach of Employment Contract Claim**

8 "Absent a contract or narrow exception, the general rule in  
9 Washington is that an employer or employee can terminate employment at-  
10 will." *Hubbard v. Spokane County*, 671 Wash. App. 671, 676 (2000). To  
11 survive Chicago Title's motion for summary judgment on her breach of  
12 employment contract claim, Plaintiff must establish she had a contract  
13 with Chicago Title or falls within a narrow exception that precluded her  
14 treatment as an "at-will" employee. Because Plaintiff is unable to  
15 establish either theory, as explained below, the Court grants Chicago  
16 Title summary judgment on Plaintiff's breach of employment contract  
17 claim.

##### 18 **A. No Express Employment Contract**

19 Plaintiff has presented no evidence to establish the existence of  
20 an express employment contract with Chicago Title that would preclude  
21 Plaintiff from being treated as an at-will employee. To the contrary,  
22 a signed Acknowledgment of Employee document is offered by Chicago Title  
23 to conclusively prove Plaintiff was strictly employed on an at-will  
24 basis. (See Ct. Rec. 20, Ex. D.) In the document, Plaintiff acknowledges  
25 she understood her employment status with Chicago Title was "at-will."  
26 *Id.* ("My signature below certifies I understand that the foregoing

1 agreement on 'at-will' status is the sole and entire agreement which my  
2 employment may be terminated.") Accordingly, the Court finds as a matter  
3 of law that no express contract existed between Plaintiff and Chicago  
4 Title to create any employment relationship other than one that was at-  
5 will.

6 **B. No Implied Employment Contract**

7 "An express agreement affirming the terminable-at-will relationship  
8 precludes a party from claiming an implied contract to the contrary."  
9 *Hibbert v. Centennial Villas, Inc.*, 56 Wash. App. 889, 892 (1990). Here,  
10 because a express agreement exists in which Plaintiff acknowledges the  
11 "at-will" nature of her employment relationship with Chicago Title, she  
12 is precluded from establishing her employment relationship with Chicago  
13 Title was not at-will due to an implied employment contract.

14 **C. Plaintiff Does Not Fall Within a Narrow Exception**

15 An at-will employment relationship may be modified by an employer's  
16 promise of specific treatment in a specific situation made in an employee  
17 handbook. *Id.* However, to prove such a claim, a plaintiff must prove:  
18 (1) statements in her employee handbook amount to promises of specific  
19 treatment in specific situations; (2) the plaintiff relied on any such  
20 promises; and (3) promises of specific treatment were breached. *Bulman*  
21 *v. Safeway, Inc.*, 144 Wash. 2d 335, 344 (2001). In this case, because  
22 Plaintiff has admitted to never reading her employee handbook or knowing  
23 what was contained in the handbook, she cannot establish the second  
24 element of reliance described above. Thus, no breach of employment  
25 contract may be premised on alleged promises contained in Plaintiff's  
26 employee handbook.



1 **V. Conclusion**

2 For the reasons expressed above, the Court grants summary judgment  
3 to Chicago Title on Plaintiff's claims of age discrimination, wrongful  
4 discharge, and breach of employment contract and because no other claims  
5 are alleged in Plaintiff's Second Amended Complaint for Damages (Ct. Rec.  
6 2-3 at 10-14) Plaintiff's case is dismissed with prejudice in its  
7 entirety.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Chicago Title's Motion for Summary Judgment on All Claims (Ct.  
10 **Rec. 14)** is **GRANTED**.

11 2. The District Court Executive is directed to **enter judgment in**  
12 **favor of Defendant** and to **close this file**.

13 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
14 this order and provide a copy to counsel.

15 **DATED** this 28<sup>th</sup> day of November, 2005.

16 S/ Edward F. Shea  
17 EDWARD F. SHEA  
18 United States District Judge

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